

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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JUN 3 - 1996

In the Matter of )

Implementation of the Local Competition )  
Provisions in the Telecommunications Act )  
of 1996 )

CC Docket No. 96-98

**REPLY COMMENTS OF U S WEST, INC.**

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## SUMMARY

In these reply comments U S WEST, Inc. ("U S WEST"), addresses briefly two aspects of the Notice of Proposed Rulemaking in this docket.

Initially, U S WEST reviews one aspect of the comments on the section of the Notice dealing with notice of technical changes. U S WEST submits that proper enforcement of the "make-buy" standard eliminates the need for further delays between announcement of the development of a new interface or new technology and its deployment. Accepting the suggestions of some commenting parties and requiring that new technology not be deployed for a significant period of time after it is ready for offering to the public would serve no useful purpose and would be contrary to the public interest.

Second, some of the commenters on the section of the Notice dealing with telephone poles, conduits, and rights-of-way pay insufficient heed to the fact that private property is protected against uncompensated governmental seizures by the Constitution. This error manifests itself in several ways: a) in claims that private parties can gain mandatory access to buildings and other private property by classifying them as rights-of-way; b) in claims that compensation for access actually gained to poles and conduits be at less than the constitutionally guaranteed reasonable value; and c) in claims that the occupational rights which exist under the statute permit governmental takings of other private property of non-carriers solely on the basis that the property owners permit incumbent local exchange carriers to use part of their property.

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**REPLY COMMENTS OF U S WEST, INC.**

I. **INTRODUCTION**

U S WEST, Inc. ("U S WEST") hereby files these reply comments to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking in the above-captioned proceeding concerning disclosure on technical information and access to poles, conduits, and rights-of-way.<sup>1</sup>

II. **DISCLOSURE OF TECHNICAL INFORMATION**  
**Notice Section II.B.4.**

There seems to be a general consensus among commenting parties that local exchange carriers ("LEC") must disclose technical information concerning interconnection and interfaces, and that such disclosure must be accomplished a reasonable time prior to actual implementation of a new interface.<sup>2</sup> The variety of methods of

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<sup>1</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182, rel. Apr. 19, 1996 ("Notice").

<sup>2</sup> Commenters referenced herein which filed comments on May 20, 1996, include: American Communications Services, Inc. ("ACS"); AT&T Corp. ("AT&T"); Citizens

disclosure suggested in the comments (it appears that U S WEST is the only party now contemplating using an Internet WEB site as a disclosure mechanism) indicate that there may be good reason for the Commission to refrain from dictating specific disclosure mechanisms. Within general guidelines of good faith, it seems that carriers can develop their own most effective means of disclosure without the confines of detailed disclosure rules.

One area, however, may present problems. Various commenting parties recommend that lengthy delays be imposed on carriers between the time they disclose a new interface and when they can actually implement the interface.<sup>3</sup> Government-enforced delays in bringing new technology to the public (which is what such suggestions amount to) raise several significant questions which must be dealt with -- and U S WEST submits that such delays are unnecessary and counter-productive.

First, if "make-buy" disclosure is in fact adhered to properly, the disclosing carrier will not gain a significant advantage even if the time between disclosure and implementation is fairly short. It must be remembered that a "make-buy" decision includes a decision to introduce a service which relies on the new interface in addition to introduction of the interface itself. In other words, the "make-buy" point occurs when the carrier actually makes the decision to introduce a new interface or deploy

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Utilities Company ("Citizens"); GST Telecom, Inc. ("GST"); MCI Telecommunications Corporation ("MCI"); MFS Communications Company, Inc. ("MFS"); Teleport Communications Group Inc. ("Teleport"); U S WEST; Winstar Communications, Inc. ("Winstar").

<sup>3</sup> See, e.g., MFS at 14-15; ACS at 11-12.

new technology. The likelihood of an unwarranted competitive advantage being obtained by the carrier in the absence of a long delay between disclosure and implementation is very slim.

Second, it must be remembered that any delays in the implementation of new technology are inefficient and harmful to the public interest. While there may be countervailing reasons for enforcing such delays in some circumstances, the fact remains that the public is deprived of beneficial services during the delay period.

Third, although the actual statutory language requiring notice of technical changes applies only to incumbent LECs, delays in implementing new technologies, even if imposed only on incumbent LECs, will necessarily affect all carriers. It is anticipated that many new interfaces will develop as a result of negotiations between carriers. If agreement is reached between an incumbent LEC and another LEC to implement a new interface, and the incumbent is prevented from implementing that interface for a protracted period of time, both carriers will be prevented from providing service to the public.

On reflection, we submit that the best method of implementing the "reasonable public notice" provisions of the 1996 Act<sup>4</sup> is to require "make-buy" disclosure, by all carriers, but to impose no further delay requirements on incumbent LECs (or other carriers). Should carriers not be providing timely "make-buy" disclosure, additional enforcement options can be considered at the appropriate time in the future.

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<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 251(c)(5) ("1996 Act").

III. ACCESS TO POLES, CONDUITS, AND RIGHTS-OF-WAY  
Notice Section II.C.4.

The parties commenting on those portions of the Notice addressing access to poles, conduits, and rights-of-way can be categorized into four large groups: incumbent LECs, electric utilities, cable companies, and competitive LECs ("CLEC") (including new entrants such as AT&T and MCI). It is not surprising that most of these parties opposed the adoption of national standards and supported continued use of broad, general-use agreements for providing access to utility poles, conduits, and rights-of-way. Utilities and cable companies have had 18 years of experience operating under the 1978 Pole Attachment Act, and such general-use agreements have served them well.<sup>5</sup> However, one group of commenters, CLECs, did not share this view. These CLECs advocate that the Commission adopt detailed national standards and a variety of other regulatory constraints aimed at burdening only incumbent LECs. These CLECs' views, if incorporated into Commission regulations, would have a disproportionate impact on incumbent LECs (*i.e.*, vis-à-vis other utilities) and would violate the constitutional rights of all utilities. Not only do the CLECs want to rewrite the 1996 Act by unlawfully expanding the meaning of the term "poles, conduits, and rights-of-way," but many want to pay utilities only a small portion of the costs associated with providing access to those utility poles, conduits, and rights-of-way.

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<sup>5</sup> See 47 USC § 224; 1996 Act, 110 Stat. at 149-51 (§ 703).

A. **The Term “Poles, Conduits, And Rights-Of-Way” Cannot Be Lawfully Construed To Include Other Items Such As Privately Owned Equipment Rooms, Riser Facilities, And Other “Pathways”**

As U S WEST pointed out in its initial comments, the 1996 Act's requirement that LECs allow access to poles, conduits, and rights-of-way is a physical per se taking of LEC property.<sup>6</sup> Not only must a LEC receive full value for its property through any constitutional taking, but all statutory provisions allowing the government to take private property must be construed narrowly.<sup>7</sup> Clearly, the 1996 Act's provisions allowing access to utility poles, conduits, and rights-of-way cannot be interpreted broadly to include riser facilities, privately owned telephone equipment rooms, and other facilities/property not within the traditional meaning of the term “poles, conduits, and rights-of-way.” The suggestions by AT&T, MCI, and other CLECs that the 1996 Act permits government seizure of buildings as well is neither accurate nor reasonable.<sup>8</sup>

CLECs are also mistaken if they believe that an incumbent LEC's presence on the property of an unrelated third party (by way of a private right-of-way, or otherwise) gives the incumbent LEC the right to allow access to that property. In many cases incumbent LECs are restricted in their use of the property of others and cannot provide access to other carriers without the authorization of the property owner. In

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<sup>6</sup> U S WEST Comments at 17.

<sup>7</sup> Loretto v. TelePrompTer Manhattan CATV Corp., 458 U.S. 419 (1982).

<sup>8</sup> AT&T at 14-15; MCI at 22-23; GST at 1; Citizens at 4; Winstar at 5-6; MFS at 9.



such cases, CLECs should be seeking access from the property owner, not from the incumbent LEC.<sup>9</sup> As U S WEST said in its initial comments, incumbent LECs cannot grant what they do not have, and we see nothing in the 1996 Act which grants the Commission the authority to seize the property of third parties simply because they allow an incumbent LEC to occupy part of their property.<sup>10</sup>

**B. The 1996 Act's Requirement To Provide Nondiscriminatory Access Cannot Be Read To Include A Requirement To Rearrange Or Construct Facilities**

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Section 703 of the 1996 Act requires that a utility provide “nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”<sup>11</sup> Numerous CLECs claim that this Section of the 1996 Act requires incumbent LECs to rearrange existing facilities or construct new facilities if CLECs request access and capacity is exhausted.<sup>12</sup> AT&T goes so far as to imply that incumbent LECs must replace “obsolete” copper cables with fiber to free up space for CLECs.<sup>13</sup> The plain wording of Section 224(f) cannot be read to support such expansive interpretations of incumbent LECs’ obligations to provide nondiscriminatory access to poles, conduits, and rights-of-way.

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<sup>9</sup> Furthermore, there is no language in the 1996 Act or its legislative history that suggests that an incumbent LEC has any obligation to make available facilities that are not a part of the regulated telephone network (i.e., facilities on the customer’s side of the network demarcation point).

<sup>10</sup> U S WEST Comments at 17.

<sup>11</sup> 1996 Act, 110 Stat. at 150 (§ 703, adding 47 USC § 224(f)(1)).

<sup>12</sup> See, e.g., AT&T at 16; MCI at 21; MFS at 10; GST at 5.

<sup>13</sup> AT&T at 17.

Any requirement to rearrange or construct facilities is as much a taking as the physical occupation of existing poles, conduits, or rights-of-way.<sup>14</sup> As with any statutory provisions authorizing the taking of private property, the provisions of Section 224(f)(1) must be construed narrowly.<sup>15</sup> As such, the Commission may not lawfully construe Section 224(f)(1) to include a requirement to rearrange, construct, or acquire facilities. If capacity is exhausted, CLECs are free to enter into private negotiations with utilities, if they so choose, for the rearrangement of existing facilities or the construction/acquisition of additional poles, conduits, and rights-of-way.

### C. Other Issues

CLECs urge the Commission to impose a variety of additional burdens on incumbent LECs in the administration of their poles, conduits, and rights-of-way. The following is a sampling of the CLECs' proposed constraints which range from unnecessary to ridiculous.

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<sup>14</sup> State of Washington ex rel. Oregon R.R. v. Fairchild, 224 U.S. 510 (1912) (state railroad commission's mandate that railroad construct track connections between competing railroads at its own expense for purpose of facilitating the interchange of business constituted a taking of property); Great Northern Ry. Co. v. Minnesota, 238 U.S. 340 (1915) (requiring railway to erect scales in a village stockyard constituted a taking of property); see also ICC v. Oregon-Washington R.R. & Navigation Co., 288 U.S. 14 (1932) ("[T]o require extension of existing lines beyond the scope of the carrier's commitment to the public . . . is a taking of property in violation of the Federal Constitution"); and Midwest Video Corp. v. FCC, 571 F.2d 1025, 1058 (8th Cir. 1975) (opining that proposed regulation requiring cable companies to construct facilities and dedicate them to public use without compensation would be a taking in violation of the Fifth Amendment).

<sup>15</sup> See note 7 supra.

1. Modifications and Notice

Teleport asserts that utilities should be required to provide a twelve-month notice prior to any modifications of poles, conduits, and rights-of-way.<sup>16</sup> Additionally, Teleport requests that utilities be prohibited from making modifications more than once in any two-year period.<sup>17</sup> Not only would such a ridiculous requirement unnecessarily burden utilities, but it would also create a barrier for CLECs wanting access to utility poles, conduits, and rights-of-way.

2. Audits

MFS suggests that the Commission should adopt rules allowing “any party contesting a claim of insufficient space to audit the LEC’s outside plant records in order to verify the claim” and to conduct a physical inspection if necessary.<sup>18</sup> The Commission should decline to adopt such a wholly unnecessary rule. The Commission has established complaint procedures which allow for discovery and which are quite adequate to deal with any capacity disputes.

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<sup>16</sup> Teleport at 10.

<sup>17</sup> Id.

<sup>18</sup> MFS at 11.

### 3. Cost

MCI asserts that in determining costs of rearrangements and of freeing up capacity, utilities must ignore actual costs and assess charges based on [total service long run incremental cost] TSLRIC.<sup>19</sup> Clearly, any approach, such as MCI's, that does not ensure that utilities recover their full costs of rearrangements and additions will not pass constitutional muster. U S WEST analyzes the TSLRIC issues in its comments and reply comments in Phase I of this docket.<sup>20</sup>

AT&T asserts that in cases where incumbent LECs must expand capacity,<sup>21</sup> LECs must cover the cost of unused capacity and CLECs should be charged only for the share they actually use.<sup>22</sup> AT&T's proposal is neither reasonable nor lawful. If unused capacity is available for the future use of all current users, these users, including CLECs, should be required to cover a reasonable share of the costs associated with this capacity. It is disingenuous for AT&T to argue that incumbent LECs should not be allowed to reserve space more than twelve months in advance,<sup>23</sup> while asserting that these same LECs must cover the costs of any unused capacity.

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<sup>19</sup> MCI at 23-24.

<sup>20</sup> See Comments of U S WEST, filed herein May 16, 1996 at Exhibit A; Reply Comments of U S WEST, filed herein May 30, 1996 at 6-21.

<sup>21</sup> As noted above in Section III.B., this claim in itself is constitutionally suspect.

<sup>22</sup> AT&T at 18-19.

<sup>23</sup> Id. at 16.

#### 4. Records

AT&T urges the Commission to "require that utilities provide to telecommunications carriers promptly upon request their cable plats and conduit prints showing the nature and location of poles, cables, and conduits."<sup>24</sup> While this request at first glance does not appear to be unreasonable, it is. Such a request would not only be quite burdensome for utilities such as U S WEST that have literally thousands, if not millions, of such records, but many of these records are paper records with no duplicate to be found in a computerized data base. Furthermore, providing copies to individual carriers would not necessarily give them the information they are seeking -- that is, the location of spare capacity. A determination as to what capacity will be available in the future is not a job that can be done in isolation -- this can be accomplished only through joint planning sessions with the utility and other carriers using or wishing to use utility poles, conduits, and rights-of-way. In the absence of joint planning, carriers may be frustrated in their plans to use the same space as another carrier. Thus, the costs of AT&T's proposal far outweigh any benefit associated with it.

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<sup>24</sup> Id. at 19.

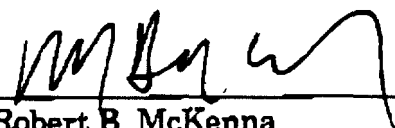
5. Tariffs

AT&T also asserts that utility pole attachment and conduit rates must be tariffed.<sup>25</sup> The Commission should reject AT&T's proposal. Such a tariffing requirement would be totally at odds with the 1996 Act and the history of pole attachment and conduit regulation under the 1978 Pole Attachment Act. As U S WEST observed in its initial comments, the 1996 Act contemplates that utilities and carriers will continue to enter into broad joint-use agreement for the use of poles, conduits, and rights-of-way, as has been the case under the 1978 Pole Attachment Act.<sup>26</sup> A tariffing requirement would violate Congressional intent in adopting the pole attachment provisions of the 1996 Act and would supersede existing pole attachment and conduit agreements.

Respectfully submitted,

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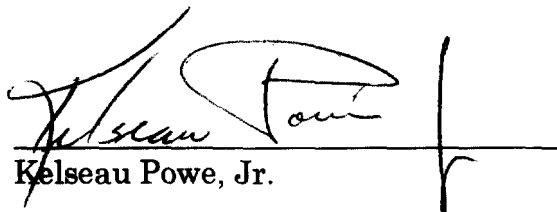
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<sup>25</sup> Id. at 14.

<sup>26</sup> U S WEST Comments at 20.

## **CERTIFICATE OF SERVICE**

I, Kelseau Powe, Jr., do hereby certify that on this 3rd day of June, 1996, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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